

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

ORDER

Plaintiff David Callahan, a state prisoner, brings this action under 42 U.S.C. §1983 for violation of the Eighth Amendment. On January 31, 2006, Magistrate Judge Robert E. Bacharach filed two Reports and Recommendations, each of which are considered below.

I.

The Report and Recommendation at doc. no. 256 recommends that the court deny the motion to dismiss filed by defendants Poppell, Champion, Atwood, Fogle, Gregston, Glenn, Posvic, Johnson, Wilkerson, Armstrong, Simon, Storms, Willis, and the Lawton Correctional Facility. (Motion to Dismiss at doc. no. 248.)

This Report and Recommendation advised the parties that they could object to the Report and Recommendation by February 21, 2006, and further advised that failure to object waives appellate review of the suggested rulings. No objection has been filed.

With no objection having been filed, and having reviewed the January 31, 2006 Report and Recommendation at doc. no. 256, the record, and the relevant authorities, the court hereby **AFFIRMS**, **ACCEPTS**, and **ADOPTS** the Report and Recommendation in its entirety. Accordingly, the motion to dismiss filed by defendants Poppell, Champion, Atwood, Fogle, Gregston, Glenn, Posvic, Johnson, Wilkerson, Armstrong, Simon, Storms, Willis, and the Lawton Correctional Facility is **DENIED**. As explained in the Report and Recommendation, the motion to dismiss is moot with respect to defendants Poppell, Champion, Glenn, Posvic, Wilkerson, Armstrong, Simon, Storms, and Willis; these defendants were not named in the fourth amended complaint and are no longer parties to this lawsuit. With respect to the remaining defendants, the motion is denied on its merits.

II.

The other Report and Recommendation which is before the court is the Report at doc. no. 257. That Report and Recommendation addresses motions for summary judgment found at doc. nos. 223 and 228. This Report and Recommendation recommends three rulings: that under the Eleventh Amendment the court dismiss without prejudice the official capacity claims against defendant Cotner; that the court grant summary judgment to defendants Atwood, Gregston, Fogle, and Johnson in their personal and official capacities; and that the court grant summary judgment to the Lawton Correctional Facility and to Mr. Cotner in his personal capacity. Plaintiff has objected to the recommendation that the court grant summary judgment to defendants Atwood, Gregston, Fogle, Johnson, Cotner, and the Lawton Correctional Facility. (Plaintiff's objections at doc. no. 258.)

The court reviews all objected to matters *de novo*. 28 U.S.C. § 636(b)(1)(B). Having done so, and having reviewed all other matters addressed in the Report, the court finds that no purpose would be served by repeating the magistrate judge's

determinations or analysis here, and further finds that the Report should be accepted in its entirety.

Accordingly, the court hereby **AFFIRMS**, **ACCEPTS**, and **ADOPTS** the Report and Recommendation of Magistrate Judge Robert E. Bacharach of January 31, 2006, found at doc. no. 257, in its entirety, and the defendants' motions for summary judgment (at doc. nos. 223 and 228) are **GRANTED**, as follows. First, under the Eleventh Amendment, the official capacity claims against defendant Cotner are **DISMISSED** without prejudice. Second, summary judgment is **GRANTED** to defendants Atwood, Gregston, Fogle, and Johnson, in their personal and official capacities. Third, summary judgment is **GRANTED** to the Lawton Correctional Facility and to Mr. Cotner in his personal capacity.

These rulings fully adjudicate this action, and judgment will be entered accordingly.¹

Dated this 24th day of February, 2006.



STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

03-0551p015(pub).wpd

¹In addition to the motions addressed in the magistrate judge's Reports, two other motions showed as pending on the court's docket at the time the Reports were entered by the magistrate judge. (Other motions at doc. nos. 226 and 245.) Although final adjudication of this action automatically terminates these other motions, the court observes as a matter of housekeeping that these two other motions were already moot. (The motion for summary judgment found at doc. no. 226 was mooted by the filing of the amended motion for summary judgment, doc. no. 228. The motion at doc. no. 245, which is actually more in the nature of a notice than a motion, was mooted by the filing of plaintiff's fourth amended complaint.) These other motions are now formally **STRICKEN** as moot.